

# **Post-conflict International Humanitarian Law Obligations Regarding Post-mortem Handling of Dead Soldiers Left in Combat Area.**

**The case of the 2008-2010 searches for remains of fallen Norwegian Waffen SS  
volunteers left after the Kaprolat/Hasselmann incident June 1944.**

Student number: 167925

Supervisor: Kai Krüger

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# 1. Introduction

## 1.1 The purpose of the thesis

The purpose of this thesis is to identify and clarify the obligations international humanitarian law poses on Russia,<sup>1</sup> Germany and Norway<sup>2</sup> regarding the remains of the Norwegian Waffen SS soldiers<sup>3</sup> who died during combat actions in the Russian Karelia in 1944.

The problem for discussion has its background in experiences made by the Norwegian Kaprolat Committee. In 2005 several mortal remains were localised in the Kaprolat and Hasselmann area in Russian Karelia (location shown on map). From death marks and other equipment found next to the remains, it became clear that the remains belonged to Norwegian Waffen SS soldiers who died during the Second World War. On the basis of this knowledge the Kaprolat Committee was established by professor Stein Ugelvik Larsen<sup>4</sup> with the objective to put an end to the tragic episode in the Karelia region. The Committee appealed to the Norwegian and Russian authorities in order to arrange for the search, collection, identification and repatriation of the remains. It proved however difficult to get the State's authorities on board.

The same year as the remains of the Norwegian Waffen SS soldiers were found, the Norwegian Ministry of Foreign Affairs prepared a memo dealing with the possibility of existing legal obligations for Norway and Russia regarding the remains. The memo concluded that no such legal obligation existed.<sup>5</sup> According to the Norwegian authorities at the time the identification and burial of the remains should be seen as a German responsibility, while the return of the remains would be a private matter.<sup>6</sup>

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<sup>1</sup> As successor of the Soviet Union.

<sup>2</sup> In this thesis Norway is considered as a belligerent State under the Allied Parties during the Second World War (at least in June 1944). Norwegian courts sentenced Norwegian volunteer SS soldiers who fought in Russian Karelia for providing help for Germany during a war in which Norway participated cf. the Norwegian Criminal Code section 86 cf. e.g. Rt. 1945/365.

<sup>3</sup> Classified as traitors under Norwegian criminal law (see note 2) and thus formally classified as enemies to the Allied Parties.

<sup>4</sup> Expert on Norwegian war history and Professor Emeritus at the Institute of Comparative Politics at the University of Bergen.

<sup>5</sup> Norwegian Ministry of Foreign Affairs, internal memo 'Funn av levninger etter norske frontkjempere i Russland' Case no. 05/08348 Document no. 22.

<sup>6</sup> Letter from Prime Minister Kjell Magne Bondevik's office to chairman of the Kaprolat Committee, professor Stein Ugelvik Larsen (2005).

## 1.2 The Kaprolat/Hasselmann incident

The obligations regarding the Norwegian Waffen SS soldiers who died during the Kaprolat/Hasselmann incident is the topic for discussion. The Norwegian Waffen SS skiing company, later to be transformed to the Waffen SS skiing battalion ('skijegerbataljonen'), was established as a part of the German forces during the summer of 1942. The battalion's objective was to defend Finland against the Soviet Union.<sup>7</sup> From February 1944 the battalion was stationed in what is now Russian Karelia on two elevations in the terrain which functioned as outposts. These elevations were named Kaprolat and Hasselmann after two German officers.<sup>8</sup>

In May 1944 Soviet troops started to escalate. The Norwegian battalion, on the other hand, was strongly reduced due to the fact that a lot of the soldiers were granted leave or dismissed during the summer. In June merely 200 soldiers were left in the two locations to defend the outposts against some thousand attacking Soviet soldiers.<sup>9</sup> In the time space 25 to 27 June, the German/Norwegian defenders were overrun by the largely outnumbering Soviet forces.<sup>10</sup>

Although a few combatants from the Norwegian battalion managed to escape and make their way back to safe territories on the German side, the majority of the battalion was either imprisoned or killed and left on the battlefield. The bodies of the approximately 110 Norwegian SS soldiers who died during the Soviet attack on Kaprolat and Hasselmann were not buried then and have since 1944 been left in the open, subject to animals, scavengers and incidental Russian excavating. The question for discussion is thus whether the involved States are in any way obligated to ensure a humane treatment of the remains.

## 1.3 The structure of the thesis

Before determining which obligations international humanitarian law (IHL) poses on the States concerning the remains I want to clarify what IHL is, what are its sources and how these sources create obligations for the States. These matters will be discussed in chapter 2. In chapter 3.1 I attempt to identify which obligations States have under international

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<sup>7</sup> Erik Veum *De som falt: Nordmenn drept i tysk krigstjeneste* 2ed (2009) 156-157.

<sup>8</sup> Norske digitale kilder 1940-1945 'Kaprolat' Available at: <http://www.nordiki.no/kaprolat.htm> [Accessed 22 November 2010].

<sup>9</sup> Veum (note 7) at 159 - 160

<sup>10</sup> 'Tagesbefehl: The official German rapport on the events'. Available at: <http://www.nordiki.no/Tagesbefehl.jpg> [Accessed 15 September 2010].

humanitarian law regarding soldiers who die on the battlefield. The question of whether these obligations apply to our specific scenario is discussed in chapter 3.2. In chapter 3.3 I briefly consider the matter of the obligations' enforcement. Chapter 4 seeks to clarify what specific actions are required by the States under their IHL obligations and whether the States by recent activities have in fact been acting in accordance with these obligations. In chapter 5 I summarise and conclude.

## **2. Preliminary clarifications**

### **2.1 What is International Humanitarian Law?**

The theme of the thesis is obligations under international humanitarian law. International humanitarian law is a branch of international law, also known as the laws of armed conflicts or the laws of war. IHL comprises all those rules of international law which are designed to regulate the treatment of individuals in international armed conflicts.<sup>11</sup> The area of law has its origin in the customary practices of armies, but a universal codification began in the nineteenth century.<sup>12</sup> Since then, States have agreed to a series of practical rules, based on the experiences gained in war. These rules strike a careful balance between humanitarian concerns and the military requirements of States, with the objective to limit the effects of armed conflicts. International humanitarian law protects persons who are not or are no longer participating in the hostilities, and restricts the means and methods of warfare.<sup>13</sup>

The driving force behind the development of IHL is the International Committee of the Red Cross (ICRC), funded in 1863. The ICRC has been the initiator to the conclusions of the many Hague and Geneva Conventions and Additional Protocols.<sup>14</sup>

International humanitarian law is not to be confused with international human rights law which also strives to protect individuals, albeit from a different angle. While IHL mainly applies during armed conflicts, human rights law applies in principle at all times, i.e. both in

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<sup>11</sup> Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law: Volume I: Rules* (2005) xxvi.

<sup>12</sup> Henckaerts and Doswald-Beck (note 11) xxv.

<sup>13</sup> ICRC Advisory service on international humanitarian law 'What is International Humanitarian Law?' Available at <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm> [Accessed 22 November 2010].

<sup>14</sup> Henckaerts and Doswald-Beck (note 11) xxvi.

peacetime and in situations of armed conflict. The difference becomes clearer by the fact that some human rights treaties permit governments to derogate from certain rights during armed conflicts.<sup>15</sup>

Although international humanitarian law regulates the treatment of all individuals in international armed conflicts, this thesis is delimited to IHL concerning the dead. In time of peace, States decide for themselves how they want to act when their nationals die abroad.<sup>16</sup> When soldiers die during time of war, on the other hand, States must respect the obligations entered into under IHL in order to protect the dead.

The main consideration behind the specific rules concerning the dead is ‘the right of the families to know the fate of their relatives.’<sup>17</sup> Consequently, it is important to inform the family of the location of their dead relatives. To make this possible, every party to a conflict has to try to collect information that will aid the identification of dead bodies. Moreover, mortal remains must be respected, buried decently and gravesites marked.<sup>18</sup>

## 2.2 The sources of international humanitarian law

Obligations under international humanitarian law are created through the sources of IHL.<sup>19</sup> The Statute of the International Court of Justice (ICJ)<sup>20</sup> Article 38 ‘...is generally regarded as a complete statement of the sources of international law.’<sup>21</sup> Its paragraph 1 provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

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<sup>15</sup> ICRC Advisory service on international humanitarian law ‘International Humanitarian Law and International Human Rights Law’. Available at: [www.ehl.icrc.org/images/resources/pdf/ihl\\_and\\_ihrl.pdf](http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf) [Accessed on 26 November 2010]

<sup>16</sup> The Norwegian Foreign Services shall in accordance with the Statute of the Foreign Services Section 1 give Norwegian citizens abroad support in relation to deaths. It is however within the Foreign Services administrative discretion to decide what this support entails.

<sup>17</sup> Cf. Article 33(1) of Protocol I.

<sup>18</sup> Marco Sassòli and Antoine A. Bouvier *How does Law Protect in War? Volume I* 2ed (2006) 170-171.

<sup>19</sup> ILC ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) *YILC*, vol. II, Part Two, p 55, para. 3.

<sup>20</sup> The Statute of the ICJ Article 36(1) provides that ‘[t]he jurisdiction of the Court comprises all cases which the parties refer to it...’ The ICJ’s function is to decide in accordance with international law, and thus also international humanitarian law, international disputes submitted to it by States cf. Articles 34(1) and 38(1). Article 93(1) of the United Nations Charter provides that all members of the Organization are *ipso facto* parties to the Statute of the Court.

<sup>21</sup> Ian Brownlie *Principles of Public International Law* 7ed (2008) 5.

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions in Article 59 [which states that the decisions of the Court has no binding force except between the parties and in respect of that particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rule of law.

According to Article 38(a) international conventions are a source of international law. The conventions establish rules expressly recognized by the contesting States. This entails that only States that have taken the necessary steps in order to bring the convention into force are bound by its terms.<sup>22</sup> The most important conventions on international humanitarian law are the Geneva Conventions of 1949. Of importance are also the two Additional Protocols to the 1949 Geneva Conventions which were concluded in 1977. When it comes to establishing obligations regarding soldiers who die in the field, the most important treaties are the I Geneva Convention of 1949 for the Amelioration of the Condition of the Wounded Armies in the Field and its Additional Protocol I.

Although the term ‘international conventions’ often is associated with multilateral law making treaties, also bilateral agreements can be a source of international humanitarian treaty law.<sup>23</sup> These bilateral treaties are, of course, only binding upon the parties which have agreed to their terms. In 1992 Germany and Russia concluded an agreement concerning German and Russian war dead and war graves on the adverse party’s territory.<sup>24</sup> It might be argued that the Norwegian SS volunteers are to be included in the interpretation of ‘German war dead’ in accordance with the agreement’s Article 2(a). However, the agreement only establishes obligations for the States with regard to the opposing party’s war dead. Thus, while Germany is in accordance with Article 3(3) obligated to tend to and maintain Russian war graves on German territory, the agreement does not pose any obligations on Germany regarding the German war dead. Moreover, the only obligation the agreement establishes for Russia

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<sup>22</sup> International Humanitarian Law Research Initiative ‘What is IHL?’ Available at: <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083> [accessed 23 November 2010].

<sup>23</sup> Brownlie (note 21) at 14.

<sup>24</sup> The German-Russian agreement Article 1.



concerning German war dead is to allow German authorities to establish war graves on Russian territory.<sup>25</sup>

Article 38(b) establishes international customs as a source of international law. While conventions only bind States that have expressly agreed to their terms, customary international humanitarian law is binding upon all States.

In 1995 the 26th International Conference of the Red Cross and Red Crescent invited the ICRC to prepare a report on the customary rules of international humanitarian law.<sup>26</sup> The ICRC published its study consisting of 161 customary international humanitarian rules in March 2005. The study is based on an 'extensive and thorough research into national, international and ICRC sources, which was carried out by a mix of national and international research teams, a steering committee of scholars and the ICRC research team. The practice collected was evaluated by academic and governmental experts.'<sup>27</sup>

The Study in itself is not a source of law and is thus not formally binding on the States.<sup>28</sup> However, the objective of the Study has been to identify the rules that already bind all States in armed conflicts.<sup>29</sup> Insofar as the ICRC has succeeded in this objective, the rules are thus binding on all States as customary law cf. the ICJ statute Article 38(b).

In consistency with the statute and jurisprudence of the ICJ, the ICRC defined customary law as practically uniform, extensive and representative State practice accepted as law.<sup>30</sup> To make sure that the study was representative the ICRC consulted widely with governmental and other experts in their personal capacity during its research. The governmental experts were also consulted one last time, prior to the publishing of the Study, to make certain that the study was legally accurate.<sup>31</sup> This suggests that the study in fact is a correct statement of

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<sup>25</sup> The German-Russian agreement Article 3(2).

<sup>26</sup> Frits Kalshoven *Constraints on the waging of war: an introduction to international humanitarian law* 2ed (2001) 16 and Malcom MacLaren and Felix Schwendimann 'An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law' *GLJ* (2005) Vol. 6 No. 9 p 1217 at p 1235.

<sup>27</sup> MacLaren and Schwendimann (note 26) at p 1235

<sup>28</sup> Statement by Judge Christopher G. Weeramantry, Judge, International Court of Justice in 'the Report on the ICRC-AALCO Conference on custom as a source of humanitarian law', (2005) 5. Available at: [www.aalco.int/ICRC-AALCO%20Conferece%208-9December%202005.pdf](http://www.aalco.int/ICRC-AALCO%20Conferece%208-9December%202005.pdf) [Accessed 23 November 2010]

<sup>29</sup> MacLaren and Schwendimann (note 26) at p 1222

<sup>30</sup> Henckaerts and Doswald-Beck (note 11) at xxxvi

<sup>31</sup> MacLaren and Schwendimann (note 26) at p 1239

customary international humanitarian law, and that the rules in the study thus are binding on all States.<sup>32</sup> In this thesis I will assume that the Study is binding on the States as a manifestation of customary international humanitarian law.

There is a dynamic relationship between treaty IHL and customary IHL which makes it important to regard both when applying this set of law. When taken together, the international humanitarian conventions cover much of IHL. Yet these treaties do not (alone or all together) cover the entire international humanitarian law. Thus, when applying treaty provisions one must confer the customary law to make sure that one is seeing the entire picture. On the other hand, the IHL treaties sometime introduce completely new provisions, creating new international humanitarian law. In time, the result can be modification of the customary international law. In the meantime however there will be a discrepancy between the two sources of law making it important to regard the treaty IHL while applying customary IHL.<sup>33</sup>

According to Article 38(c) of the Statute, general principles of law are also a primary source of international law. It has been argued that although the general principles of law have a function in the application of law, the principles are by themselves too imprecise to provide a satisfactory basis for decision.<sup>34</sup> General principles of law may first be understood as those principles of domestic law which are common to all legal orders. Secondly, general principles of international humanitarian law are those principles specific to IHL.<sup>35</sup> Some of these principles are the principle of humanity<sup>36</sup>, the principle of necessity and the principle of

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<sup>32</sup> Although the Study has been criticised it has been invoked in both international and national jurisprudence. *Prosecutor v. Enver Hadžihanović and Amir Kubura* notes 54, 55, 56, 74, 95, 96 and 99 cited in Theodor Meron 'Editorial Comment: Revival of Customary Humanitarian Law', (2005) 99 *AJIL* 817 at 834, United States, Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defence, et al.*, Case No. 05-184. 29 June 2006, p. 69. See also Israel, The Supreme Court Sitting as the High Court of Justice, *Adalah and others v. GOC Central Command, IDF and others*, 23 June 2005, HCJ 3799/02 paras. 20, 21 and 24, and *The Public Committee against Torture in Israel and others v. The Government of Israel and others*, 13 December 2006, HCJ 769/02, paras. 23, 29-30 and 41-42 cf. Jean-Marie Henckaerts 'Customary International Law: a response to US comments' (2007) 89 *International Review of the Red Cross* p 473 at p 487 note 54. Also legal scholars generally seem to rely on the rules in the study e.g. Arne Willy Dahl *Håndbok i militær folkerett* 2ed (2008) 26 and Jann K. Klefner 'Protection of the Wounded, Sick, and shipwrecked' p 325 in Dieter Fleck *The Handbook of International Humanitarian Law* 2ed (2008) 338. For criticism of the study see Ian Scobbie 'The approach to customary international law in the study' in Elizabeth Wilmshurst and Susan Breau *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 15 at 16 and The ASIL 'United States Responds to ICRC Study on Customary International Law' *AJIL* (2007) Vol. 101 No. 3 p 639.

<sup>33</sup> Yoram Dinstein *Conduct of Hostilities under the Law of International Armed Conflict* (2004) 7.

<sup>34</sup> Rosalyn Higgins *Problems and Process: International law and how we use it* (1994) 222

<sup>35</sup> Sassòli and Bouvier (note 18) at 138-139

<sup>36</sup> Particularly as expressed in the so called Marents clause which was first introduced in the preamble of the Hague Convention No. II of 1899.

proportionality. These principles often have to be taken into consideration when interpreting IHL rules.<sup>37</sup>

Thus, Arne Willy Dahl argues that the principle of military necessity has to be considered as an element of interpretation as to how far a State's obligations reach. He validates this statement with historic examples: The second Geneva Convention Article 18 states that the '...Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked...' In spite of this it has in retrospect been deemed as legitimate that the HMS Dorsetshire in May 1941, out of concern for own safety, left several hundred survivors after Bismarck sank. This because members of the crew had received notification of a submarine being observed in the water. For the same reasons the submarine HMS Conqueror's omission in 1982 to emerge to save survivors after General Belgrano, have been deemed legitimate. Thus the words 'all possible measures' must be interpreted as 'all military possible measures'.<sup>38</sup>

The principle of military necessity is however not a very relevant factor of interpretation several years after a conflict has ended. On the other hand, it would be onerous, and thus probably not in accordance with the drafters of the IHL conventions' intentions, to construe all obligations as being absolute where another intention is not expressly stated. However, in similarity to the principle of military necessity, the principle of proportionality has been employed to ease the application of norms of international law in particular cases.<sup>39</sup> The principle of proportionality is both a principle of IHL and international law in general and should also be considered as an element of interpretation as to how far a State's obligations reach.

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<sup>37</sup> Sassòli and Bouvier (note 18) 138-139.

<sup>38</sup> Dahl (note 32) at 49. Dahl writes that conversely captain Eck's murder of all survivors on the freighter *Pelus* during the Second World War, so that they would not reveal that Eck's submarine operated in the waters if they were rescued, was not accepted. Likewise, it can not be deemed as being military necessary that the wounded Norwegian Waffen SS soldiers at Kaprolat/Hasselmann were shot by the Soviet soldiers because it would be too much work entailed with bringing the wounded soldiers with them.

<sup>39</sup> Higgins (note 34) 219. The author herself, however, is sceptical to the principles use outside IHL.

## 2.3 State obligations

Legal obligations are legal requirements with which subjects to the law are bound to conform.<sup>40</sup> When determining what an obligation entails, a distinction is commonly drawn between obligations of conduct and obligations of result.<sup>41</sup> The classification of a State obligation as either an obligation ‘of conduct’ or an obligation ‘of result’ must be made through interpretation of the obligation.<sup>42</sup>

An obligation of result provides that a State has to achieve a specific result, but does not provide the particular means the State has to employ to achieve it. Conversely, an obligation of conduct might also state a specific result, but the obligation will always as well provide for the specific steps (acts or omissions) the State has to undertake in order to reach this result. The description of conduct must be rather specific for the obligation to be an obligation of conduct.<sup>43</sup>

To determine whether an obligation of result has been breached, one has to compare the result actually achieved by the State with the result required by the obligation.<sup>44</sup> Conversely, to determine whether an obligation of conduct has been breached, one has to compare the action or omission found to have occurred with the conduct specifically required of the organ responsible for said act or omission.<sup>45</sup>

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<sup>40</sup> Stanford Encyclopaedia of Philosophy ‘Legal Obligation and Authority’. Available at: <http://plato.stanford.edu/entries/legal-obligation/> [Accessed 22 November 2010].

<sup>41</sup> ILC (note 19) at p 56 para. 11.

<sup>42</sup> The International Law Commission (ILC) ‘Report of the Commission to the General Assembly on the work of its twenty-ninth session’ (1977) *YILC*, vol. II, Part Two, p 16 para. 17.

<sup>43</sup> Human Rights Resource Centre ‘Obligations of States and Nonstate Actors’. Available at: <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module9.htm> [Accessed 22 November 2010].

<sup>44</sup> ILC (note 42) at p 29 para 35.

<sup>45</sup> ILC (note 42) at p 16 para 18.

### **3. Which IHL obligations are posed on the respective States regarding the remains of the Norwegian Waffen SS soldiers who died during combat actions in the Russian Karelia in 1944?**

#### **3.1 The State obligations under international humanitarian law regarding post-mortem handling of soldiers left in combat area**

##### **3.1.1 The obligation to search, collect and evacuate the dead and to prevent them from being despoiled**

The first Geneva Convention Article 15(1) states that ‘[a]t all times, and particularly after an engagement, Parties to the conflict shall without delay, take all possible measures...to search for the dead and prevent their being despoiled.’ According to Protocol I Article 33(4) ‘[t]he Parties to the conflict shall endeavour to agree on arrangements for teams to search for...and recover the dead from battlefield areas...’

On the background of these treaty rules as well as State practice and several national military manuals, the ICRC has identified Rule 112 which provides that ‘[w]hen circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.’<sup>46</sup> According to the Study’s rule 113 ‘[e]ach party to the conflict must take all possible measures to prevent the dead from being despoiled.’

The question is which obligations can be deduced from these provisions. According to the ICRC, the obligation to search, collect and evacuate the dead must be interpreted as an obligation of conduct.<sup>47</sup> The fact that both the treaty provisions and the customary rule describe actions, that are to be taken by the States, supports this view. However, as seen in chapter 2.3 the action or conduct has to be specific for the obligation to be an obligation of conduct. The fact that the obligation does not describe specific steps that have to be taken in order to search, collect and evacuate the dead and to prevent them from being despoiled, points in the direction of the obligation being an obligation of result.

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<sup>46</sup> Henckaerts and Doswald-Beck (note 11) at 406-408.

<sup>47</sup> Henckaerts and Doswald-Beck (note 11) at 407.

Still, an obligation of result is breached where the result achieved by the State is not in conformity with the result required by the obligation. In this case the obligation does not call for a definite result, but rather that the parties to the conflict have to take ‘all possible measures’ to aim towards a result. This points decisively in the direction of the obligation being an obligation of conduct.

Hence, the obligation is for the States to make sure their conduct is consistent with taking ‘all possible measures’ to search, collect and evacuate the dead and prevent them from being despoiled. This can also entail permitting humanitarian organisations, including the ICRC, to carry out the mission. What taking ‘all possible measures’ entails in this specific circumstance for the different parties to the conflict may depend on an interpretation of the obligation on the basis of the fundamental principles of international law and IHL (see chapter 2.2).

In accordance with the principle of proportionality, the term ‘all possible measures’ cannot be interpreted as every possible measure no matter how costly or no matter how uncertain it is that it carries results. When determining what all possible measures entail, concern must thus be had to inter alia the costs, the certainty of positive outcome and amount of diplomatic difficulties the search and evacuation will cause for the State. This must be weighed against the concern to humanity. The interests of everyone being entitled to a dignified burial in a marked grave and the rights of the families to know the fate of their relatives are such concerns.

### **3.1.2 Obligations with a view to the identification of the dead**

The I Geneva Convention Article 17 codifies obligations with a view to identifying the dead.<sup>48</sup> According to Article 17 the ‘Parties to the conflict shall ensure that burial...is preceded by a careful examination, if possible by a medical examination of the bodies, with a view to conforming death, establishing identity and enabling a report to be made...’ The phrase ‘shall ensure’, indicates an obligation.

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<sup>48</sup> Also Article 16 of the Convention establishes some obligations in this regard, but this is limited to the registration of available information such as particulars as shown on the dead soldier’s identity cards.

On the basis of the I Geneva Convention, numerous military manuals as well as resolutions adopted on the international level,<sup>49</sup> the ICRC has identified customary rule 116. The rule establishes that '[w]ith a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.'<sup>50</sup> Also this rule is formulated as an obligation for the parties.

The provisions establish the identification of the dead as the result of the obligation. This could suggest that we are dealing with an obligation of result. However, an obligation of conduct might have, in similarity to an obligation of result, a particular object of result. The difference is that for the obligation to be an obligation of conduct, the result has to be achieved through actions specifically determined in the obligation. Since the obligation describes which actions that are to be taken in order to identify the dead, the obligation is an obligation of conduct.

The obligation is to record '...all available information...' When it comes to the Norwegian SS soldiers, their remains have been lying in the open for so many years that DNA testing might be the only way to identify them. This is especially true since scavengers have taken objects that could have been of importance to the identification. The question is then whether an obligation to perform DNA testing can be interpreted into the obligation to record all available information. From a natural interpretation the DNA might not be deemed as 'available information', since there has to be performed extensive testing to get the results. Hence, it might be argued that the obligation to perform DNA testing cannot be deduced from the obligation to record all available information.

However, the ICRC study states the parties have to use their best efforts and all means at their disposal in order to identify the dead. According to the ICRC, practice suggests that exhumation combined with the application of forensic methods, including DNA testing, may be an appropriate method of identifying the dead after burial.<sup>51</sup> The reason why DNA testing is an appropriate method of identifying the dead after burial is presumably because this might be the only possible way to identify decomposed remains. DNA testing should thus be an appropriate method of identifying the dead also in our case.

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<sup>49</sup> The resolution V of the 22<sup>nd</sup> International Conference of the Red Cross (1973), General Assembly Resolution 3220 (XXIX) (1974) and the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent (1999).

<sup>50</sup> Henckaerts and Doswald-Beck (note 11) at 417 cf. p 379 and p 417-419.

<sup>51</sup> Henckaerts and Doswald-Beck (note 11) at 420.

The commentary to Article 17 states that in the absence of papers that can establish the identity of the dead soldier ‘recourse must be had to other methods which will make it possible for the adverse Party itself to establish his identity, e.g. measurements and description of the body and its physical features, examination of the teeth, fingerprints, photograph, etc.’<sup>52</sup> These examples seem to include most of the methods available in order to identify a body in 1949. This suggests that today when DNA testing is a possibility, this method must be applied. However, since DNA testing is a fairly expensive measure, concern must be had to the principle of proportionality also in this regard.

According to ICRC’s study on customary IHL, the obligations with a view to identifying the dead are reinforced by the requirement of respect for family life and the right of families to know the fate of their relatives. Both these principles have customary status as well as being codified in several multinational treaties.<sup>53</sup> Thus concern should also be had to these requirements when applying the obligations.

### **3.1.3 The obligation to dispose of the dead in a respectful manner**

The obligation to dispose of combatants who die in the field in a respectful manner is codified in the I Geneva Convention Article 17. The Article specifies that the dead must be buried, if possible, according to the rites of the religion to which they belonged and that they may only be cremated in exceptional circumstances. The Article furthermore provides that burial should be in individual graves grouped according to nationality if possible.<sup>54</sup>

Article 17’s opening phrase is ‘Parties to the conflict shall ensure...’ The wording indicates an obligation. Accordingly, the commentary to the I Geneva Convention states that the Parties to the conflict have to make certain that this prescribed task, for which they are responsible, is duly carried out and there is no justification for thinking that the task is optional.<sup>55</sup>

On the basis of Article 17 as well as many military manuals and legislation in most, if not all, States the ICRC study on customary IHL has identified customary rule 115. The rule

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<sup>52</sup> Jean Pictet *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) 177.

<sup>53</sup> Henckaerts and Doswald-Beck (note 11) at 417 cf. p 379 and p 421.

<sup>54</sup> Henckaerts and Doswald-Beck (note 11) at 416.

<sup>55</sup> Pictet (note 52) at 176-177.



establishes that '[t]he dead must be disposed of in a respectful manner and their graves respected and properly maintained.'<sup>56</sup> The fact that the dead 'must' be disposed of in a respectful manner indicates that also the customary rule sets forward an obligation for the States.

The question is then whether the obligation to dispose of the dead in a respectful manner is an obligation of conduct or an obligation of result. Article 17 describes specific steps that the parties have to undertake in order to dispose of the dead in a respectful manner and is thus an obligation of conduct. This entails that the States that are subject to the obligation have to act in conformity with the conduct described to fulfil the obligation.

The conduct is described as something the parties 'shall ensure' or 'must' do. This indicates an absolute obligation. The further requirements to the burial in Article 17, on the other hand, are delimited to what is possible. However, no State can be obliged to achieve something that the State is not in a position to achieve.<sup>57</sup> Also the primary obligation to dispose of the dead in a respectful manner must consequently be delimited to what is possible.

As seen under chapter 3.1.1 the principle of proportionality can lead to a narrow interpretation of the term 'all possible measures' when it comes to the obligation to search, collect and evacuate the dead. This will indirectly have effect on the interpretation of the present obligation since the obligation to search, collect and evacuate the dead is a *conditio sine qua non* for respectful burial.<sup>58</sup> It is however difficult to imagine a situation where the principle of proportionality could lead to further limitations on the obligation to give the dead a respectful burial where the dead are collected in accordance with the obligation in chapter 3.1.1.

Article 34(1) of the I Protocol states, in a very generally manner, that the remains of certain persons 'shall be respected'. According to the commentary to the Protocol this provision for one part entails, in similarity to Article 17 of the I Geneva Convention, that the remains are to be disposed of as far as possible in accordance with wishes or the religious beliefs of the

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<sup>56</sup> Henckaerts and Doswald-Beck (note 11) at 414.

<sup>57</sup> Human Rights Resource Centre (note 43).

<sup>58</sup> Henckaerts and Doswald-Beck (note 11) at 407.

deceased. However, according to the commentary the provision also entails that the parties have to place the remains in an appropriate place before burial or cremation.<sup>59</sup>

### **3.1.4 The obligation to endeavour to facilitate the return of the remains and to return the personal effects of the deceased**

The I Geneva Convention Article 17(2) states that the Parties to the conflict shall ‘...organize at the commencement of hostilities an Official Graves Registration Service, to allow...the possible transportation to the home country.’

The reference to the possible return of the remains was introduced by the Diplomatic Conference of 1949. The clause was left optional to satisfy both the countries that as a custom bring the dead home at the close of hostilities and the countries that prefer to have them buried in the actual location where they have fallen.<sup>60</sup> As a consequence the provision is rather general and requires agreement between the parties for the remains to be returned. It cannot be deduced any obligation to return the remains from this provision, but it obligates the parties to arrange for the possibility.

The I Protocol Article 34(2) c provides that ‘[a]s soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities...shall conclude agreements in order...to facilitate the return of the remains of the deceased...to the home country upon its request or, unless that country objects, upon the request of the next of kin.’

The fact that the parties ‘shall’ conclude agreements to facilitate the return of the remains implies a legal obligation. The obligation is to conclude agreements. Consequently, the obligation is for the State to undertake a specific act which entails that the obligation is an obligation of conduct.

The fact that the obligation, in addition to being conditioned on a request, is conditioned on the circumstances and the relations between the adverse parties demonstrates that the parties

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<sup>59</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann *Commentary on the Additional Protocols* (1987) 367 para. 1307.

<sup>60</sup> Pictet (note 52) at 181.

are not expected to do more than what can be reasonably expected in order to conclude the agreements.

Based on the I Geneva Convention Article 17(2), the I Protocol Article 34(2), three international resolutions that calls upon parties to armed conflicts to facilitate the return of the dead<sup>61</sup> as well as State practice and military manuals, the ICRC identified customary rule 114. The rule states that the '[p]arties to the conflict must endeavour to facilitate the return of the remains of the deceased upon the request of their next of kin.'<sup>62</sup>

The obligation does not specifically describe which steps the State has to undertake in order to facilitate the return of the remains. However, seeing that the obligation does not describe a definite result, but rather an objective the States should endeavour to reach, the obligation has to be construed as an obligation of conduct.

The fact that the parties must 'endeavour' to facilitate the return of the remains does not mean that the parties have to take all available measures in this regard. Still, the parties have to make an effort to make this happen. Where a State has not made such effort its conduct is inconsistent with the obligation.

A natural understanding of the phrase 'facilitate' is to assist the progress of something. In the commentary to Article 34 it is written that the fact that the agreements concluded in accordance with the Article must 'facilitate' the return of the remains implies the exhumation of the remains, when they have been buried, and the forwarding of such remains.<sup>63</sup> In accordance with the natural understanding of the word 'facilitate', I assume that it is adequate for the obligated State to assist the progress of such exhumation and forwarding of remains. The customary rule also uses the term 'facilitate'. It is presumed that the term has the same meaning in both legal bases.

The Protocol Article 32 states as a general principle that in the implementation of the Protocol's section on the missing and dead '...the activities of the...Parties to the conflict...shall be prompted mainly by the right of families to know the fate of their relatives.

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<sup>61</sup> See note 49.

<sup>62</sup> Henckaerts and Doswald-Beck (note 11) at 411.

<sup>63</sup> Sandoz, Swinarski and Zimmermann (note 59) at 373 para. 1334.

The customary rule also builds on this principle. Thus, a possible return of the remains would be to Norway as country of citizenship and where the soldier's next of kin are situated, as opposed to Germany that was the State in whose force the soldiers were serving.

The obligation in the customary rule 114 is conditioned on a request from the next of kin. Logically the next of kin will often first be capable of putting forward such request after the obligation to search, collect and evacuate the dead has been fulfilled. Since the I Geneva Convention Article 17(2) obligates the parties to provide for the possible return of the remains of the deceased, a breach of the obligation to search, collect and evacuate the dead can possibly be seen as a breach of this obligation as well.

As regards the return of personal effects, Article 16(3) of the I Geneva Convention states that the parties shall collect and forward to each other '...last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead.' The obligation is to forward the personal effects to 'each other' which would entail that the State on whose territory the effects are found forwards the effects to the home State of the deceased. However, the obligation is clearly motivated by the concern to the next of kin and it is this concern which determines which types of objects that should be returned.

According to the customary rule 114 the '[p]arties to the conflict...must return [the deceased's] personal effects to [their next of kin].' State practice and *opinio juris* have evidently gone in the direction of an obligation for all parties to the conflict to ensure the return of the objects directly to the deceased next of kin as opposed to home State. The objects expressly provided for in Article 16(3) must be presumed as also constituting 'personal effects' under the customary rule.

The obligation to return the personal effects is formulated as a strict obligation, but without describing the specific steps the State should undertake to come to the result. This obligation is consequently an obligation of result. Where the conduct of a State has not lead to the result of the personal effects being returned to the deceased's next of kin, the State has not acted in

accordance with the obligation.<sup>64</sup> However, also this obligation has to be delimited to what is possible and proportionate.

## **3.2 The obligations' scope of application**

### **3.2.1 Do the obligations apply to the remains of the Norwegian soldiers in German war service?**

According to Article 13 of the I Geneva Convention, the Convention applies *inter alia* to '[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces'. The I Protocol has a wide scope of application and applies to all those affected by an armed conflict.<sup>65</sup> Volunteer soldiers in German forces thus fall within the treaties' scope of application.

International humanitarian law is designed to protect those who are not or no longer, taking part in the hostilities, such as the wounded, the sick, prisoners and civilians.<sup>66</sup> The reasoning behind the rules of protection in IHL is that an attack on the protected persons gives a little or non-existent military advantage.<sup>67</sup> Dead combatants are obviously of no threat to the opposing party and, as we have seen, their remains are thus protected by several treaty provisions as well as customary rules of international humanitarian law.

After having established that the remains of dead volunteer soldiers principally are to be protected, the question is whether this includes the remains of the Norwegian Waffen SS soldiers who died in the Karelia region. As seen, the situation is particular since it involves Norwegian soldiers,<sup>68</sup> in German service, whose remains are left on Soviet/Russian territory. The question is whether there are any limitations to the principle of protection which could entail that the IHL does not apply to these specific soldiers.

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<sup>64</sup> The I Protocol Article 34(2) c, on the contrary is formulated as an obligation to 'facilitate' the return of the personal effects upon request from either the home State of the deceased or his next of kin. The commentary to the Protocol states that Article 34 cannot diminish the obligations arising from the Conventions cf. Sandoz, Swinarski and Zimmermann (note 59) at 373 para. 1331.

<sup>65</sup> Cf. Article 9 cf. Article 1 cf. the Geneva Conventions common Article 2.

<sup>66</sup> Marco Sassòli and Antoine A. Bouvier *How does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law: Volume II: Cases and Documents* 2ed (2006) 2115.

<sup>67</sup> Dahl (note 32) at 132.

<sup>68</sup> Categorized as traitors cf. the Norwegian Criminal Act section 86.

Frits Kalshovden states that '[t]he system of protection of the Geneva Conventions rests on the fundamental principle that protected persons must be respected and protected in all circumstance, and must be treated humanely without any adverse distinction founded on sex, race, nationality, religion, political opinion, or any other similar criteria.'<sup>69</sup> When it comes to warfare on land, this principle is codified in the first Geneva Convention Article 12. In the commentary to the I Geneva Convention it is accordingly stated that '[t]he wounded are to be respected just as much when they are with their own army or in no man's land as when they have fallen into the hands of the enemy. The obligation applies to all combatants in an army, whoever they may be...'<sup>70</sup> In the ICRC Study the principle of no adverse distinction is identified as a rule of customary IHL.<sup>71</sup>

In other words, the fact that the soldiers who fought in Karelia were Norwegian nationals in German service, or the fact that they were considered as traitors under Norwegian law, does not make any difference when it comes to which protection their remains are to receive under IHL. Hence, the obligations under international humanitarian law regarding the dead are applicable to the remains of the Norwegian Waffen SS soldiers.

### **3.2.2 Do the obligations apply post-conflict?**

The Geneva Conventions' common Article 2 establishes the material scope of application of the conventions to '...all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.' It will here be assumed without further discussion that the Second World War fulfils these requirements. Thus, the preliminary provision for the application of IHL is present and the situation falls within the international humanitarian law's material scope of application. However, as the Second World War ended in 1945 the question is whether the IHL continues to apply post-conflict.

According to the I Protocol Article 3, the Protocol and the Geneva Conventions shall apply from the beginning of a declared war or any other armed conflict. The application ends '...in the territory of Parties to the conflict, on the general close of military operations...except...for

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<sup>69</sup> Frits Kalshovden (note 26) at 53.

<sup>70</sup> Pictet (note 52) at 134.

<sup>71</sup> Codified as rule 88 cf. Henckaerts and Doswald-Beck (note 11) at 308. The principle is also set forth in the I, II and IV Geneva Conventions (Articles 13, 16 and 27).

those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.’

The treaties’ temporal scope of application regarding the dead combatants thus end either ‘on the general close of military operations’ or at their ‘final...repatriation.’ The natural understanding of the word ‘repatriation’ is that persons are returned to their own country. Repatriation of the dead would thus have to entail returning the remains of the deceased to their home State. An argument for employing the general close of military operations as the decisive moment is that there does not necessarily have to be a ‘final...repatriation’ in the case of deceased. Often, dead combatants are buried in the State where they die, regardless of this being their home State or not.

Against this argument counts the fact that both the obligation to endeavour to facilitate the return of the remains of the deceased and the obligations with a view to the identification of the dead in some cases call for the exhumation of remains. The IHL regarding the dead is thus applicable also after burial. Consequently, final repatriation could be the appropriate decisive moment for the end of application of international humanitarian law, even if combatants often are buried in the State where they die.

According to Article 15(1) of the I Geneva Convention and customary rule 112, the obligation to search, collect and evacuate the dead is to be fulfilled ‘particularly after each engagement’. The wording could seem to indicate that the obligation is meant to be carried out in close connection to the combat actions and that the application thus ends ‘on the general close of military operations’. In accordance with this interpretation the commentary to the I Geneva Convention states that ‘Article 15 applies exclusively to operations at the front.’<sup>72</sup> This implies that the Article only is applicable during continuing hostilities. The question is whether this excludes the obligation to search, collect and evacuate the dead from being employed post-conflict.

According to the International Committee of the Red Cross’ Final rapport on the Missing, the I Geneva Convention Article 15 deals with the serious issue of ‘...the management of human

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<sup>72</sup> Pictet (note 5252) at 150.

remains post-conflict...'<sup>73</sup> The obligation '...to search for the dead and prevent their being despoiled...' was here applied with regard to the two-year war between Ethiopia and Eritrea two years after the war ended. This implies that at least the ICRC deems the obligation to be applicable post-conflict.

The questions relating to the remains of the deceased pose problems 'well after the end of an armed conflict.'<sup>74</sup> The international humanitarian law would therefore not give satisfying protection to this group of people if its application was to end on the general close of military operations. This could entail that the obligations must be interpreted as being applicable until final repatriation of the remains. The fact that fulfilment of all the other obligations regarding the dead is conditioned on a preceding fulfilment of the obligation to search, collect and evacuate the dead, entails that this obligation in particular should be interpreted widely.<sup>75</sup> Seeing that the commentary to Article 3 of the I Protocol mentions the provisions relating to the dead as examples on articles whose application may continue beyond termination of the conflict,<sup>76</sup> the conclusion must be that the I Protocol and the Geneva Conventions are applicable to the dead 'until their final...repatriation...'<sup>77</sup>

The I Geneva Convention itself contains a provision providing that the final repatriation of the protected persons is the decisive moment for the end of its application.<sup>78</sup> Seeing that the *Nicaragua case* establishes that the Convention is a mere crystallization of customary international law, it is presumed that the same point of time is decisive for the application of customary IHL.<sup>79</sup> Thus, the IHL obligations regarding the dead apply post-conflict.

### **3.2.3 Are Russia, Germany and Norway bound by the obligations?**

The I Geneva Convention and the I Protocol have been ratified by Russia, Germany and Norway. Hence, the three States are directly bound by obligations set forth by these treaties. Furthermore, all States are bound by obligations deriving from customary law. The question is

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<sup>73</sup> Gill Kitley 'Strategies for raising concern on the war dead with governments, the United Nations and non-governmental organizations: Some experiences from United Nations peacekeeping operations.' ICRC's final rapport on *The Missing: Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families*, p 80.

<sup>74</sup> Sandoz, Swinarski and Zimmermann (note 59) at 341 para. 1193.

<sup>75</sup> Henckaerts and Doswald-Beck (note 11) at 407.

<sup>76</sup> Sandoz, Swinarski and Zimmermann (note 59) at 66 para. 149.

<sup>77</sup> Cf. I Protocol Article 3.

<sup>78</sup> I Geneva Convention Article 5.

<sup>79</sup> *Nicaragua case* p 103 para. 208.



whether the three States specifically are bound by obligations regarding the Norwegian SS soldiers in the particular setting.

According to Article 1 of the I Geneva Convention '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. The fact that the parties have to 'respect' the convention entails that the parties have to act in accordance with obligations addressed to them.<sup>80</sup> To find out whether Russia, Germany and Norway are bound by the obligations regarding the dead with concern to the Norwegian soldiers we thus have to find out which States the obligations are addressed to.

Most of the obligations regarding the dead are addressed to 'the parties to the conflict'.<sup>81</sup> The question is which States the parties to the conflict, in which the Norwegian Waffen SS soldiers died, are. The parties to a conflict are defined as the opposing sides in an armed conflict.<sup>82</sup> The identification of the opposing sides in this conflict depends on whether we see the battle over Finland or the entire World War II as the 'conflict' referred to.

In its *Tadic* judgement the International Criminal Tribunal for the former Yugoslavia (ICTY) presented a definition of 'armed conflict' which later has been generally accepted. According to the court an 'armed conflict' is '...resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'<sup>83</sup> This definition does not help us determine what conflict is referred to in our case.

However the ICTY elaborates the definition with regard to the application of IHL by stating that '...international humanitarian law continues to apply in the whole territory of the warring States...whether or not actual combat takes place there.'<sup>84</sup> All the parties to the Second World

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<sup>80</sup> The fact that the Contracting Parties also undertake to 'ensure respect' for the Convention entails that '...in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.' Cf. Pictet (note 52) at 26.

<sup>81</sup> To be accurate The Protocol Article 34(2) which provides for the obligation to conclude agreements in order to facilitate the return of the remains of the deceased and of personal effects to the home country is only addressed to the High Contracting Parties in whose territories the remains are situated. In this case that would be Russia. However, the obligation to endeavour to facilitate the return of the remains and personal effects embodied in the customary law does not have the same restrictions and is thus addressed to all the parties to the conflict.

<sup>82</sup> ICRC 'Banning Anti-Personnel Mines – The Ottawa Treaty Explained' (1998) Annex I.. Available at: <http://www.reliefweb.int/rw/lib.nsf/db900SID/PANA-7DQHZP?OpenDocument> [Accessed 23 November 2010].

<sup>83</sup> *The Prosecutor v. Dusko Tadic* para. 70.

<sup>84</sup> *The Prosecutor v. Dusko Tadic* para. 70.

War must be deemed as warring States at the time. This indicates that World War II was the conflict and not the battle over Finland.<sup>85</sup> Moreover, the fact that IHL continues to apply in the whole territory of the warring State whether or not actual combat actions takes place there, suggests that the fact that the specific combat actions took place in Finland is not decisive for the assessment of the area of conflict.

On the other hand, it might seem unreasonable for all States, parties to the Second World War, to be obligated with concern to all the persons who died at all different battlefields during the war. The question is thus whether the obligations' personal scope of application have to be given a narrower interpretation.

It would be logical if the obligations regarding the dead were addressed to the State in which territory the remains were situated, seeing that this State will have jurisdiction over the remains. The predecessor to the I Geneva Convention of 1949, the 1929 Geneva Convention Article 3 addressed the obligation to search for the dead to '...the occupant of the field of battle...' The commentary to the I Geneva Convention states that the readdressing from 'the occupant of the field of battle' in the 1929 Convention to 'the Parties to the conflict' in the 1949 Convention was meant to make the obligations of the belligerents more comprehensive.<sup>86</sup> This entails that it is not just the State that have territorial jurisdiction over the remains which have obligations regarding them. Also the fact that many of the obligations concerning the dead now require agreements and cooperation between the States makes it apparent that the obligations bind more than one State.

As regards the possibility of unreasonable results, this can be remedied by using the principles of international law and IHL as an element of interpretation as to how far the States' obligations reach. For instance, applying the principle of proportionality, a State with moderate connection to a specific combat action might be assigned less far reaching obligations than the State in whose territory the incident took place. Where there is very limited connection between a State and the dead combatants, the State can probably not be expected to take more comprehensive measures than what could have been expected of a third party, regardless of connection to the conflict, in terms of the obligation 'to ensure respect' for

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<sup>85</sup> See note 2.

<sup>86</sup> Pictet (note 52) at 151.

the international humanitarian law.<sup>87</sup> Hence, all the parties to the Second World War are ‘parties to the conflict’ and should thus be subjects to IHL obligations regarding the dead Norwegian Waffen SS soldiers.

On the other hand, Statements in the Diplomatic Committee makes the application of obligations contained in the I Protocol’s section on the missing and dead vis-à-vis a States’ own nationals questionable.<sup>88</sup> This could suggest that Norway is not subject to the obligations regarding the dead Norwegian soldiers. However, no such exception is made in the I Geneva Convention which as a result also should apply in the relationship between Norway and Norwegian soldiers.<sup>89</sup> Moreover, the ICRC does not seem to have detected such delimitation in the scope of application in their study on customary IHL. Consequently, at least as long as the obligations do not exclusively derive from the Protocol, they are also applicable in the relationship between Norway and the Norwegian Waffen SS soldiers.

The question is then whether anything in the particular tripartite relationship makes any difference as to the obligations imposed on the three States. The commentary to the I Geneva Convention states that the obligation to respect the Convention is ‘...not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties.’<sup>90</sup> The fact that the other States are not fulfilling their obligations does thus not interfere with the obligations of the first State. Conversely, the fact that other States are obligated or have assumed responsibility for certain actions does not interfere with the obligations of the first State, assuming that actions by the second State have not caused the obligation to cease to exist by its fulfilment.

To conclude, Russia, Germany and Norway are all bound by the obligations regarding the dead Norwegian Waffen SS soldiers.

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<sup>87</sup> See note 80.

<sup>88</sup> O.R. XIII p. 361, CDDH/II/406/Rev.1, para. 32. This might be due to the traditional concept of international law claiming that a person can only be a legal subject within a State.

<sup>89</sup> The opposite is true for the IV Geneva Convention. See Oscar Uhler and Henri Coursier *Commentary on the IV Geneva Convention relative to the Protection of Civilian Persons in the time of war* (1958) 372.

<sup>90</sup> Pictet (note 52) at 25.

### **3.2.4 Can the obligations as they are construed today be applied with regard to the remains of soldiers who died in 1944?**

#### **3.2.4.1 The principle of no retroaction**

We have until this point established the IHL obligations regarding the dead as they are to be construed on the basis of the sources applicable today. However, it is by no means obvious that these sources are applicable when it comes to obligations regarding the remains of soldiers who died in 1944. International humanitarian law is a dynamic instrument. Treaties concluded at different points in time develop the law. The same do State actions and the work of international organizations. As a result, what is construed as being applicable IHL at one point in time is not necessarily the same as what is applicable IHL 10 or 60 years later. This brings about the question of whether an IHL provision can apply to circumstances that happened prior to the provision came into force.

When a rule of law is applied to a situation which occurred prior to the rule came into force, the rule is given retroactive effect. Frede Castberg writes that it is a general principal in every civilized community that new legal rules is not given retroactive effect and that this is also a principle of international law.<sup>91</sup>

In national Norwegian law the Constitution prohibits the Norwegian parliament from giving laws retroactive effect. The States, as lawmakers on the international level, are not restrained by a similar prohibition. This entails that where a provision in a treaty explicitly provides for its own retroactive effect, this will be a valid international provision. It is where the treaty provision is silent on the matter of retroactivity the principle of no retroaction comes into action.<sup>92</sup> This principle is now codified in Article 28 of the Vienna Convention on the Law of Treaties which states that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.' Thus, as a main rule the obligations regarding the dead based on the I Geneva Convention from 1949, the I Protocol from 1977 and customary IHL developed after the Second World War, cannot be applied with regard to any act or fact which took place in 1944.

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<sup>91</sup> Frede Castberg *Folkerett* 2ed (1948) 21-22.

<sup>92</sup> Castberg (note 91) at 21-22.

The question is whether an exception has to be made because a different intention is established.

#### 3.2.4.2 Applicability of obligations that explicitly address historical events

Where the obligations in a treaty explicitly address historical events, an intention to apply the obligations to acts or facts which took place or any situation which ceased to exist before the date of entry into force of the treaty is established. In accordance with the Vienna Convention Article 28, obligations under IHL may thus be applied to circumstances which happened prior to the provision came into force where the obligations explicitly address historical events. The I Geneva Convention was drafted during the aftermath of the Second World War. It could be argued that the drafters must have had the soldiers, who lied unburied at different locations as a consequence of the war, in mind when they drafted the provisions concerning the dead and that the obligations thus address historical event.

However, the application of the provisions with regard to the soldiers who died during the Second World War is not mentioned in the Convention or its commentaries. This could be seen in relation to the fact that the Chapter in the Convention containing the provisions on the dead was not on the whole assessed to entail any radical change from the corresponding provision in the I Geneva Conventions predecessor, the 1929 Geneva Convention. According to the commentaries to the I Geneva Convention, the changes and additions that had been made was on matter of details and the majority of the new provisions could be regarded as implicit in the earlier texts.<sup>93</sup> This could however indicate that the same rule of law that is interpreted from the I Geneva Convention is applicable to earlier events even if the provisions do not explicitly address historical events.

Yet, when it comes to the I Protocol, although some of the provisions relating to the dead are mere clarifications of existing obligations, some provisions also entails an extension of the existing obligations.<sup>94</sup> Since my interpretation of the current obligations regarding the dead also is based on the provisions in the I Protocol,<sup>95</sup> this entails that the obligations only are applicable if the provisions in the Protocol explicitly addresses historical events.

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<sup>93</sup> Pictet (note 5252) 132-133.

<sup>94</sup> Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (Geneva 1974-1977) O.R. XI, p 186, CDDH/II/SR.19.

<sup>95</sup> And customary law which is partly based on the Protocol.

In the Commentary to the section on the missing and dead in the I Protocol it is stated that ‘[o]bviously we would not wish to defend the idea of retroactive application of the Protocol, but even so it is to be hoped that Parties bound by it will refer to it to resolve problems still unresolved at the end of a conflict which had ended before they had become bound by the Protocol.’<sup>96</sup> Hence, the extended obligations in the I Protocol do not address historical events. Thus, the obligations as they are construed today are not applicable with regards to the remains of the soldiers who died in 1944 on the basis of the obligations explicitly addressing historical events.

### 3.2.4.3 Applicability of obligations entered into during a continuing wrongful act

Because a different intention does not appear from the treaties or is otherwise established, the provisions do not bind the Parties in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaties. The same is the case for the customary obligations that have developed after the war.

However, what is stated in Article 28 of the Vienna Convention is that the ‘provisions do not bind a party in relation to...*any situation which ceased to exist* before the date of entry into force of the treaty with respect to that party (my emphasis).’ The question is whether a breach of an international obligation that has a continuing character renders the obligations entered into before the breach ceases applicable to the situation.

In its *Lovelace v. Canada case* the Human Rights Committee found that an act may constitute a breach of an international obligation, even if the act is committed before the obligation is entered into. The condition is that the act has a continuing character which extends past the point in time when the obligation comes into force. The continuing act will then constitute a breach of the obligation after this date.

In the case the Committee held that it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada accepted the committee’s jurisdiction in 1976. The committee also found that the continuing impact of the Canadian

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<sup>96</sup> Sandoz, Swinarski and Zimmermann (note 59) p 341 para. 1193.

legislation constituted a breach of Article 27 of the International Covenant on Civil and Political Rights which also was entered into in 1976.<sup>97</sup>

Also the European Court of Human Rights' jurisdiction is limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. The Court has as a result applied the principle of continuing wrongful acts to establish its jurisdiction *ratione temporis* in a series of cases.<sup>98</sup>

The *Papamichalopoulos case* concerned the question of whether a seizure of property was in breach of the right to peaceful enjoyment of property under Article 1 of the Protocol to the European Convention of Human Rights. Greece argued that the Court did not have jurisdiction since the alleged unlawful seizure of property occurred eight years before Greece recognized the Court's competence. The Court rejected the argument and held that there was a continuing breach of the right to peaceful enjoyment of property under Article 1, which continued after the Protocol had come into force. The Court accordingly upheld its jurisdiction over the claim.<sup>99</sup>

Similar reasoning was applied by the Court in the *Loizidou case*. Here the continuing wrongful act was the applicants denied access to her property in northern Cyprus as a result of the Turkish invasion of Cyprus in 1974.<sup>100</sup>

Consequently, if Russia, Germany and Norway's omission to take action regarding the dead Norwegian SS soldiers constitutes a continuing wrongful act, also IHL obligations entered into after 1944, but before the wrongful act ceased to exist, are applicable.

The question is whether the respective States' passivity until at least the year 2007 constituted a continuing wrongful act. Article 2 of the Draft Articles on State Responsibility (Draft Articles) provides that '[t]here is an internationally wrongful act of a State when conduct

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<sup>97</sup> *Lovelace v. Canada* CCPR/C/13/D/24/1977 para. 10-11 cited in ILC (note 19) at p 61 para. 11.

<sup>98</sup> ILC (note 19) at 60 para. 9.

<sup>99</sup> *Papamichalopoulos and Others v. Greece* para. 40 (1993) cited in ILC (note 19) 60 para. 9.

<sup>100</sup> *Loizidou v. Turkey* p. 2235–2236, para. 56 cited in ILC (note 19) 61 para. 10.

consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.’<sup>101</sup>

When the soldiers died in 1944 the 1929 Geneva Convention was the central convention establishing obligations regarding dead combatants. The 1929 Geneva Convention Article 3 establishes obligations for the occupant of the field regarding the search for and protection of the dead. Article 4 of the 1929 Geneva Convention provided obligations for all the belligerents concerning e.g. burial and identification. In addition also provisions in different peace treaties prior to the Second World War provided for the burial and possible return of the war dead, indicating customary obligations regarding the dead on the basis of State practice.<sup>102</sup> Thus certain actions were required from the Parties. This indicates that passivity from the States constituted a breach of these obligations.

However, as we have seen in chapter 2.2, obligations under international humanitarian law cannot today be construed as being absolute. Since development has gone in direction of more comprehensive State obligations, the case was probably even more so 60 years ago. This entails that the relationship between the States as well as the political situation in the States might have precluded wrongfulness in the remaining year of the war and the following years after the war came to an end.

Nevertheless, in the *Lovelace v. Canada case* there was no breach of any international obligations at the time when Lovelace lost her Indian privileges. It was here adequate to establish a ‘continuing wrongful act’ that the continuing act became wrongful after the new obligation came into force.

The States have omitted to act in accordance with IHL obligations regarding the dead. The fact that this omission cannot be construed as a wrongful act before the circumstances permitted the States to act, does not preclude the assessment of a continuing wrongful act from the moment the circumstances permitted the States to act in accordance with their

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<sup>101</sup> The Articles were adopted by the International Law Commission in 2001. General Assembly took note of the Articles by consensus, Resolution 56/83 of 12 December 2001, the text of which was annexed to the resolution, and ‘commend[ed] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action’. Since then international tribunals have more and more become accustomed to treating the Draft Articles as a source on the question of State responsibility. Moreover, amongst others the principles of continuing wrongful act has been taken to reflect customary international law. Cf. James Crawford and Simon Olleson ‘Continuing Debate on a UN Convention on State Responsibility’ (2005) 54 *ICQL* pp 959-968.

<sup>102</sup> Article 225 of the Treaty of Versailles.



obligations. Thus, the question is whether the States' omission to act with regard to the dead soldiers had a continuing character.

Article 14(2) of the Draft Articles states that '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.' In the *Rainbow Warrior* arbitration the arbitral tribunal referred with approval to the Draft Articles and the distinction between instantaneous and continuing wrongful acts. The case demonstrates how an act of omission can constitute a continuing wrongful act. According to an agreement between France and New Zealand, France was obligated to detain two agents on the French Pacific island of Hao. France failed to comply with the requirements of the agreement for a period of three years. The arbitral tribunal stated that applying the distinction between instantaneous and continuing wrongful acts on the present case '...it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach.'<sup>103</sup>

The arbitral tribunal further stated that 'According to Article 25 [now Article 14], "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.'<sup>104</sup> This implies that the States are responsible for a continuing wrongful act for as long as they have remained in unconformity with their obligations to act.

Russia, Germany and Norway have had an obligation to act ever since the soldiers died in 1944. As long as the circumstances have permitted the States to act in accordance with these obligations, the States' passivity has not been in conformity with this obligation. The States are consequently by omission responsible for a continuing wrongful act. All obligations the respective States have entered into during the period of this continuing omission are thus applicable. Hence, the IHL obligations regarding the dead as they are to be construed on the basis of the sources applicable today are applicable to the remains of the Norwegian Waffen SS soldiers who died in 1944.

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<sup>103</sup> *Rainbow Warrior* at p. 264, para. 101 cited in ILC (note 19) p 60 para. 8.

<sup>104</sup> *Rainbow Warrior* at p. 265-266 para. 105.

To conclude, Russia, Germany and Norway are obligated to take all possible measures in order to search, collect and evacuate the remains of the Norwegian Waffen SS soldiers and prevent them from being despoiled. The respective States are also obligated to record all available information in order to identify the remains of the soldiers and ensure that the soldiers are respectfully disposed of. Lastly the States are obligated to endeavour to facilitate the return of the remains of the soldiers to Norway on the request from next of kin.

### **3.3 Enforcement of the obligations**

According to the Draft Articles on State Responsibility Article 30(a), a State which is responsible for a continuing wrongful act is under an obligation to cease the act.<sup>105</sup> In our case this entails that the States have to cease the continuing omission and act in accordance with the obligations regarding the dead.

If the States refuse to fulfil their obligations the question of enforcement arises. As we have seen, the main consideration behind the specific rules concerning the dead is ‘the right of the families to know the fate of their relatives.’<sup>106</sup> However, the commentary to the I Protocol states that ‘although there may be a right...it cannot be denied that there is no individual legal right for a representative of a family to insist that a government...concerned undertake[s] any particular action.’<sup>107</sup>

It is thus the parties to the conflict and the other States parties to the Protocol who have to ensure the application of the obligations.<sup>108</sup> In a case of noncompliance the ICJ is the primary international tribunal to which States can submit legal disputes under international law.<sup>109</sup> However, a legal claim under international law has to be put forward by a State with legal interest to the claim. A State will have legal interest ‘when [its] nationals...receive injury or loss at the hands of another state.’<sup>110</sup> Where the injured parties are Norwegian nationals, Norway will probably be the only State with legal interest. This entails that there is no possible plaintiff with legal interest if Norway is the respondent to the claim.

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<sup>105</sup> The word ‘act’ covers both acts and omissions cf. Article 2.

<sup>106</sup> Cf. Article 33(1) of Protocol I.

<sup>107</sup> Sandoz, Swinarski and Zimmermann (note 59) at 346 para. 1212.

<sup>108</sup> Sandoz, Swubarski and Zimmermann (note 59) at 246 para 1213.

<sup>109</sup> See note 20.

<sup>110</sup> Brownlie (note 21) at 477-478.

Hence, the fact that we have identified the presence of specific obligations for the States regarding the dead Norwegian Waffen SS soldiers does not necessarily entail that these obligations can be enforced if the States themselves refuse to comply.

#### **4. Have the States by recent activities been acting in accordance with their international humanitarian law obligations regarding the dead?**

##### **4.1 Clarification of what actions are required in the Kaprolat/Hasselmann area**

Article 12 of the Draft Articles on State Responsibility states that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.' Since most of the obligations regarding the dead are obligations of conduct that require certain actions to be taken, it is clear that passivity from the States is not in conformity with these obligations. Moreover several of the obligations require the cooperation between the States. Where this is the case, also the refusal to cooperate must be interpreted as not being in conformity with what is required by the obligation. It must also be clear that obstructing measures aimed against other States or entities' attempt of reaching the obligations' required result, will entail a breach of the obligations regarding the dead and the obligation to 'respect and ensure respect' for the international humanitarian law.<sup>111</sup>

The question is then what more specifically the States have to do in order to act in conformity with their obligations regarding the remains of the Norwegian Waffen SS soldiers left in the Kaprolat/Hasselmann area. Firstly the States have the possibility of fulfilling their obligations through physical measures. The States can through State organs or agencies physically search, collect and evacuate the remains, guard the area against scavengers, record all available information with the view to identifying the remains, bury the remains respectfully or transport the remains back to Norway. As the remains are located in Russia such physical measures will have to be employed by Russia or with some sort of Russian cooperation. Likewise, the return of the remains to Norway will necessarily entail some sort of cooperation by the Norwegian authorities.

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<sup>111</sup> I Geneva Convention Article 1.

Secondly the States have the possibility of acting in accordance with the obligations indirectly, through the support of other States or entities' undertakings. For example we have seen that the obligation to search, collect and evacuate the dead and prevent them from being despoiled can be fulfilled by making arrangements for teams or humanitarian organisations to search for and recover the dead from the battlefield area. Also an obligation to 'ensure' the identification of the dead can be fulfilled through enabling other entities to perform the obligation. The obligation to dispose of the dead in a respectful manner is also formulated as an obligation to 'ensure' that this is done and should thus be fulfilled where this is undertaken by private or public initiatives financed or in other manner supported by the States. When it comes to the obligation to endeavour to facilitate the return of the remains and to return the personal effects of the deceased, making sure that the task is completed by another State or entity must be construed as facilitating. As regards the obligation to return personal effects of the deceased, this is an obligation of result which entails that the obligation can be performed in any manner as long as the result is achieved.

Thirdly the States can be acting in accordance with the obligations regarding the dead through political measures. These measures may comprise of the enabling of the task to be fulfilled through cooperation and the entering into agreements with the host State or others that undertake to fulfil the tasks. A political measure may also involve applying political pressure to make sure other States act in conformity with their obligations.

## **4.2 Relevant activities 2007 - 2010**

### **4.2.1 Actions by the Kaprolat Committee**

Since its establishment, the Kaprolat Committee has through cooperative arrangements with regional authorities in the Russian Karelia arranged three expeditions to the Kaprolat and Hasselmann area. These expeditions have led to the locating of the remains of approximately 70 individuals which have been transported and temporarily deposited in war memorial areas. Of these 70 individuals, 13 match DNA samples given from the Norwegian soldiers' families. These families have been given the choice of having the remains returned with assistance, but no financial support, of the Norwegian governments. The next of kin of at least three of the identified soldiers have chosen this option. Alternatively the identified remains are to be buried by the German War Grave Service (Volksbund) in German war yards.

#### 4.2.2 The Norwegian government's actions

In 2007, succeeding a shift in Government, the Ministry of Foreign Affairs decided to give consular help to those who wish to return the remains of their relatives to Norway or have them buried in Russia by the German War Grave Service, as well as administrative help to the next of kin in contact with Russian and German authorities. The consular assistance consists of the Norwegian foreign services tending to the formalities and paper work entailed to bringing a deceased out of a foreign country. The foreign services also organise the transportation.<sup>112</sup> It seems as the Norwegian authorities through this assistance are acting in accordance with the obligation to facilitate the return of the Norwegian Waffen SS soldiers' remains as well as the obligation to ensure that the dead are disposed of in a respectful manner.

The Ministry also granted some financial support to the Kaprolat committee to fund DNA identification and field studies. The expressed goals were to enable the families to see to that the remains of their relatives are buried or returned to Norway, and to make sure that no more remains are left out in the open.<sup>113</sup> It can be argued that Norway, by their support of the Kaprolat committee, is acting in accordance with the obligation to search, collect and evacuate the dead and prevent them from being despoiled. The State must take 'all possible measures' in this regard. This must be interpreted as all measures that can be reasonably expected, taking both cost and certainty of outcome into consideration. Seeing that the remains are left on a foreign State's territory, it seems probable that assisting a non-profit committee in undertaking this task is one of few measures available to the Norwegian authorities and that Norway thus is acting in accordance with this obligation.

Moreover, it seems that Norway, by their support of the Kaprolat project, is acting in accordance with the obligations with a view to identifying the dead by 'ensure[ing]' examination, DNA testing and that available information is recorded.

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<sup>112</sup> The assistance is strictly administrative and relatives requesting the remains returned have to cover the costs themselves. The assistance is the same generally given to the relatives of Norwegian nationals who die abroad.

<sup>113</sup> Svar på skriftlig spørsmål om nordmenn i tysk tjeneste ved Østfronten. Available at [http://www.regjeringen.no/nb/dep/ud/aktuelt/svar\\_stortinget/sporretime/2007/oestfronten.html?id=494380](http://www.regjeringen.no/nb/dep/ud/aktuelt/svar_stortinget/sporretime/2007/oestfronten.html?id=494380) [Accessed 26 October 2010]. The Minister of Foreign Affairs, Jonas Gahr Støre, stresses that all the assistance given with regard to the remains in Russian Karelia is given out of humanitarian considerations. He also refers to the memo from 2005, concluding that there is no legal obligation for the Norwegian authorities to give assistance.

### **4.2.3 Actions by the Russian and German authorities**

The Russian authorities have remained passive with concern to the remains of the Norwegian Waffen SS volunteers. The Soviet forces left the dead soldiers on the battlefield in 1944 and nothing indicates that the Soviet or Russian authorities have commenced anything in this regard since. On the contrary, the Russian bureaucracy has made it difficult for the Kaprolat committee to get in touch with the right authorities to get the permissions needed to undertake its field studies. The Committee has only been able to enter into agreements with regional authorities. Hence, it would seem that Russia is not acting in conformity with its obligations regarding the dead under international humanitarian law.

German authorities seem to assume responsibility when it comes to the burial of the Norwegian SS volunteers. Through the German war graves service (Volksbund), Norwegian SS soldiers who died at Kaprolat/Hasselmann have been buried in German war yards. Germany is thus acting in accordance with the obligation to ensure that the dead are disposed of in a respectful manner. Volksbund have, however, first attended to the burial after the remains have been collected and identified by the Kaprolat committee. Nothing indicates that Volksbund or other German initiatives themselves have done anything to evacuate the remains of the soldiers or have them identified. It would thus seem that Germany is not acting in accordance with the obligation to search, collect and evacuate the dead and the obligations with a view to identifying the dead.

## **5. Summary and conclusions**

The purpose of this thesis has been to identify and clarify the obligations international humanitarian law poses on Russia, Germany and Norway regarding the remains of the Norwegian Waffen SS soldiers who died during combat actions in the Russian Karelia in 1944.

International humanitarian law poses specific obligations on the parties to an armed conflict concerning soldiers who die on the battlefield during the conflict. As parties to the Second World War, Russia, Germany and Norway are subjects to such obligations regarding the Norwegian Waffen SS soldiers who died on the battlefield in the Kaprolat/Hasselmann area in

June 1944. Since the remains of the soldiers have not been repatriated, these obligations have not ceased to exist as a result of the termination of the war in 1945.

The respective States have by remaining passive omitted to act in accordance with their obligations from the date the soldiers died in 1944 until at least 2007. However, the international humanitarian law obligations cannot be construed as being absolute. Consequently, it is possible that the difficult relationship between the States, as well as the political situation within the States, would made it unreasonably burdensome for the States to act with regard to the soldiers during the remaining year of the war and the years following its termination. However, for as long as it has been possible and proportionate for the States to act in accordance with the obligations, Russia, Germany and Norway have been responsible for a continuing wrongful act. This entails that also obligations and sources of IHL entered into before the continuing omission ceased are applicable. Consequently, the IHL obligations as they are construed today, substantially based on the I Geneva Convention (1949), the I Protocol (1977) and customary international humanitarian law, are applicable with regard to the remains of the Norwegian Waffen SS soldiers.

The obligation to search, collect and evacuate the dead and prevent them from being despoiled requires the respective States to take 'every possible measure' in this regard. This must be interpreted as every possible and proportionate measure. The obligation may be fulfilled through making arrangements for teams. The Norwegian authorities have since 2007 financed the Kaprolat Committees' undertaking to locate and identify the remains and have thus been acting in accordance with this obligation. Russia and Germany, on their side, have failed to employ any measures in order to fulfil the obligation. Conversely, the Russian authorities have made it difficult for the Kaprolat project to get the necessary permissions and agreements.

The States have to ensure that all available information that can lead to the identification of the soldiers is recorded. The States should ensure DNA testing where the costs and uncertainties of such tests do not override the families' right to know the fate of their relatives and the general humanitarian advantage of persons being put to a final rest in a marked grave. Russian and German authorities have remained completely passive and have thus not been acting in accordance with the obligation. Norway, on the other hand, has acted in accordance

with the obligation through ensuring DNA testing and that available information has been recorded by supporting the Kaprolat project.

Russia, Germany and Norway are also obligated to ensure that the remains of the Norwegian Waffen SS soldiers are disposed of in a respectful manner. German authorities have by supporting the German War Grave Service's initiative to bury the soldiers seemed willing to ensure that this obligation is fulfilled. The same can be said for Norway through helping the soldiers' next of kin in contact with the German War Grave Service. Through the work of the Kaprolat Committee the Norwegian authorities have also ensured that the remains are placed appropriately in war memorial areas before burial. The Russian authorities have conversely remained passive. Their omission to act with regard to the dead is not in conformity with the obligation to dispose of the dead in a respectful manner.

The parties to the conflict have to endeavour to facilitate the return of the remains to Norway on the request of the soldiers' next of kin. The States act in accordance with this obligation when they make an effort to assist the progress of such repatriation. On the request from the soldiers' next of kin, Norwegian authorities have offered to tend to the formalities connected to the return of the remains of the soldiers from Russia to Norway. The Norwegian authorities are thus prepared to assist the progress of the return and have already done so with regard to at least three individuals. Hence, Norway is acting in accordance with this obligation. When it comes to the Russian and German authorities, nothing indicates that their obligations in this regard have been triggered by a request from the soldiers' next of kin. Their passivity is therefore not contradictory to the obligation.

The obligation to return the deceased soldiers' personal effects to their next of kin is an obligation of result. The fact that the soldiers' personal effects are in fact not returned, should entail that the three States have not acted in accordance with this obligation. However, as a result of the years gone by and of the scavengers who have been in the area, it might no longer be possible to find personal effects on the dead. If this is the case, the States can no longer be obligated to return the personal effects as the obligation cannot be construed as going further than what is possible and proportionate.

For as long as there still are remains left in the Kaprolat/Hasselmann area, which have not been evacuated, returned, buried or identified, and fulfilment of these tasks entails no more



than possible and proportionate measures, the States are obligated to undertake such measures. Due to the limited enforcement mechanisms in international humanitarian law, the challenge is for the States themselves to make certain that they are fulfilling their obligations.

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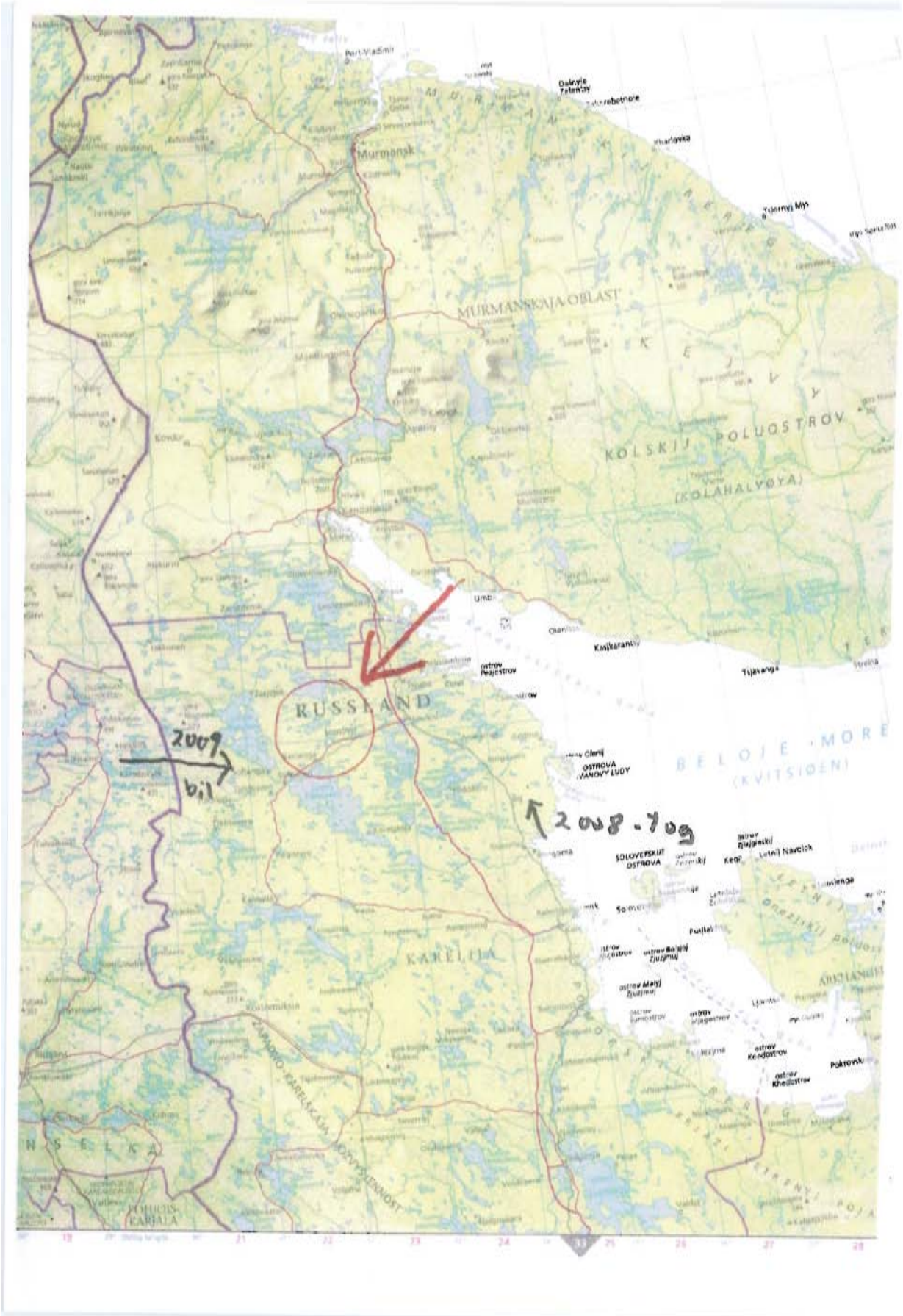
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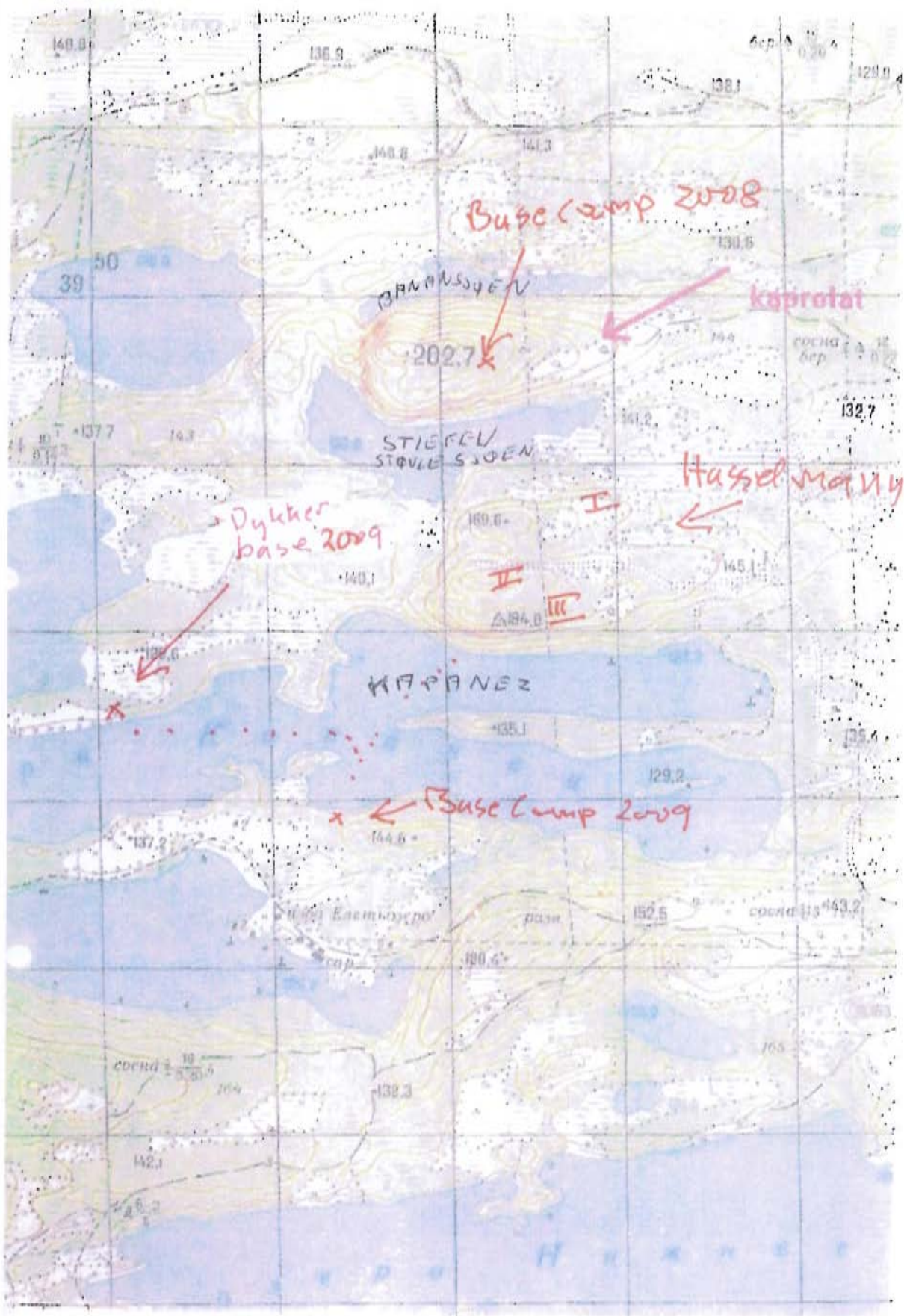
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